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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 553

JOSEPHINE KUS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief and Associate Justices of the Supreme Court of the United States:

The petitioner, Josephine Kus, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable Julius J. Hoffman presiding, was entered on June 20, 1955 A. D. (Tr. 114-15). The trial judge filed a memorandum opinion, findings of fact and conclusions of law, which were not reported but appear in the printed

transcript of record (Tr. 111-114). For the convenience of this Court, the memorandum, findings of fact and conclusions of law are reproduced in Appendix A.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed on July 6, 1956, and is reported at 234 F. (2d) 817. A copy of said opinion is attached to this petition as Appendix B, together with a copy of the judgment of that Court and the order denying rehearing.

JURISDICTION.

This action was instituted against the United States of America to recover damages for personal injuries inflicted upon petitioner when she was struck by a mail carrier employed by the United States Post Office, who was acting in the scope of his employment. The jurisdiction of the District Court was based upon the Federal Tort Claims Act, 28 U. S. C. Sec. 1346 (b). The trial court entered a judgment adverse to the petitioner on June 20, 1955 (Tr. 115). Thereafter, on August 16, 1955, within the sixty (60) day period provided by Rule 73 of the Federal Rules of Civil Procedure for such action where the United States is a party, petitioner filed a notice of appeal to the United States Court of Appeals. That court rendered its opinion on July 6, 1956, and, thereafter, a petition for rehearing was filed within the period provided by Rule 25 (a) of the Rules of the United States Court of Appeals for the Seventh Circuit. This petition was denied on August 8, 1956 (Certified Tr.). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254 (1) and 28 U. S. C. Sec. 2101 (c).

QUESTIONS PRESENTED.

1. Whether *findings of fact*, wholly general in nature, that the injuries and damages of the petitioner, Josephine Kus, were not caused by any act of the defendant's mail carrier, that petitioner had not shown due care on her own behalf, that the occurrence was an accident and that the defendant's agent, Sam Wallace, could not reasonably have expected the accident to occur, without any *subsidiary findings* stating the trial court's reasons, or the factual bases, for these conclusions or reflecting his resolution of the actual questions—(a) whether or not defendant's employee on leaving an elevator moved across the main floor corridor of an office building with his head and face turned back toward the elevator; (b) whether or not plaintiff was walking normally near the middle of the corridor, facing forward; (c) whether or not plaintiff was struck from behind, and (d) whether or not plaintiff was east of the elevator, in front of it or past it when defendant's employee emerged from it—are sufficient to satisfy the requirements of Rule 52 (a) of the Federal Rules of Civil Procedure that the trial court, sitting without a jury, "shall find the facts specially," so as to aid the trial court in arriving at the right decision and furnish a basis for proper review?

2. Whether the "clearly erroneous" rule limits the review which may be made of findings of fact which are simply the end products of the trial court's application of legal rules to the facts which are not found specially?

3. Whether the "clearly erroneous" doctrine prevents review of the findings concluding that the occurrence was an accident and that defendant's agent could not be expected to foresee the accident where there was no issue of accident (or testimony that either participant slipped or was pushed) and the controlling decisions hold that a

trier of fact may not avoid the task of deciding the issues of negligence and contributory negligence by calling on the doctrine of "legal accident" and where the controlling decisions hold that it is not necessary that the defendant be able to foresee the particular occurrence if he might have foreseen that some injury or harm could result from his conduct?

4. Whether the court below correctly held that the "clearly erroneous" rule prevented it from setting aside the finding concluding that the plaintiff had not shown she was using due care in her own behalf on the basis of evidence that the petitioner said, after the occurrence, that she was glancing at the clock (The clock was located at the turn of the corridor just about eye-level and directly in front of her (Tr. 99, 101, 105)) in a jurisdiction where the controlling decisions hold that, in the ordinary situation, a pedestrian, generally looking where he is going, may assume that others will not act negligently, and therefore he himself is not negligent in failing to observe something at right angles, or in momentarily glancing away?

STATUTE AND RULE INVOLVED.

28 U. S. C. Sec. 1346 (b) provides as follows:

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable

to the claimant in accordance with the law of the place where the act or omission occurred."

Rule 52 (a) of the Federal Rules of Civil Procedure provides as follows:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41 (b)."

STATEMENT OF THE CASE.

Petitioner brought this action under the Tort Claims Act for damages alleged to have been caused by the negligence of the defendant, through its servant, a mail carrier.

On January 11, 1952, about 8:50 A. M. the petitioner, Josephine Kus, was a pedestrian in the first floor lobby or corridor of the Marshall Field Annex Building located at 25 East Washington Street, Chicago, Illinois. This corridor is "L" shaped. Starting at the Wabash Avenue entrance, it runs straight west past a bank of eight ele-

vators located on the south side of the corridor. Beyond the elevators, the corridor turns and continues north to the Washington Street entrance of the building. At the turn of the corridor, just above door-height, is a large clock facing east toward Wabash Avenue (Tr. 99, 101, 105). Petitioner had entered the building through the north door of the Wabash Avenue entrance and was walking west, about the middle of the corridor, on her way to one of the elevators which was loading passengers (Tr. 13, 16, 29).

When plaintiff was opposite the first elevator (the one nearest Wabash Avenue), that elevator door opened and Sam Wallace, a mail carrier employed by the United States and engaged in its business, came out of the elevator and moved to the north, looking back over his shoulder toward the elevator (Tr. 41, 42, 43). Petitioner did not see the first elevator door open, but heard it click (Tr. 13). After walking a few steps further, she was suddenly struck from behind on the left side, behind the left shoulder, and immediately fell to the floor (Tr. 13, 33, 34). Sam Wallace did not see the petitioner until she was in the act of falling (Tr. 85) or until she was on the floor (Tr. 86). Defendant introduced testimony that after the occurrence Miss Kus had said she was glancing at the clock (Tr. 84).

Plaintiff fell on her right hip and sustained an injury which incapacitated her from the date of the accident until April 17, 1954. Her medical bills totaled $3,546.05 (Tr. 22, 23, 24, 25) and her lost wages totaled $6,084.00. In addition, the injury required the removal of the head of the femur and the substitution of a metal prosthesis as part of her hip joint. As a result, petitioner will continue to suffer some physical incapacity, pain and inconvenience as long as she lives (Tr. 74).

The case was tried before the court without a jury, as

required by the Tort Claims Act [28 U. S. C. § 2402]. The court made findings of fact that the occurrence was an accident, that the mail carrier could not reasonably have expected the accident to occur, that the injury to the petitioner was not caused by any act of the agent of the defendant, and that the petitioner had not shown due care in her own behalf (Tr. 114). The court reiterated its findings of fact in approximately the same language as its conclusions of law (Tr. 114, Appendix A).

After the entry of the judgment for the defendant (Tr. 114), petitioner appealed to the United States Court of Appeals (Tr. 119) which affirmed on the ground that the findings of fact were not "clearly erroneous" as required by Rule 52 (a) of the Federal Rules of Civil Procedure. Thereafter, petitioner sought rehearing, asserting that the "clearly erroneous" rule was not applicable because the errors committed were errors of law and because the findings failed to indicate the factual basis of the ultimate conclusion. A copy of this petition for rehearing, separately certified, is filed with this petition, together with nine extra copies. This petition was denied (Certified Tr.; Appendix B).

REASONS FOR GRANTING THE WRIT.

1. The proper construction of Rule 52(a) is a matter of major public importance since it arises in the majority of civil cases litigated in United States District Courts. Trial has been begun in approximately four thousand non-jury cases in the district courts each year since the fiscal year 1947. Approximately one thousand Federal Tort Claims actions are filed annually.[1] At least for the year

1. This information was supplied in a letter to counsel for the petitioner from the Administrative Office of the United States Courts dated October 26, 1956. A copy of this letter and the tabulation enclosed therewith is reproduced as Appendix "C" to this petition.

1955, and presumably for other years, a slight majority of the civil cases in which trial was begun by the eighty-six district courts were non-jury cases, *Annual Report of the Director of the Administrative Office of the United States Courts,* 1955, Table C. 7, pp. 186, 188. Thus, considering only the Federal Tort Claims Act cases, a substantial portion of the cases tried annually involve issues similar to those in the instant case, and a majority of the cases tried annually are subject to the requirements contained in Rule 52 (a) of the Federal Rules of Civil Procedure.

The instant case presents an illustration of the effect that a construction of Rule 52 (a) can have upon such litigation. Here, an admittedly seriously injured plaintiff (Tr. 114) was denied recovery. The trial court made cursory and general findings of ultimate issues, unaccompanied by subsidiary findings which would indicate the basis for them. The reviewing court, accepting the "clearly erroneous" mandate of Rule 52 (a) at its face value and, ignoring the construction which has been placed upon it by this Court and by other Courts of Appeals, as will subsequently be shown, gave these findings an unwarranted significance.

The findings of the trial court with respect to the issues of negligence and freedom from contributory negligence are in essence, mere statements that the plaintiff did not show she was not negligent and that the defendant was not negligent (Findings 6 and 7; Tr. 114). It is significant that the trial judge himself repeated Findings of Fact 6 and 7, the crucial findings in this case, in almost identical language as Conclusions of Law 2 and 3 (Tr. 114), thus indicating a doubt as to whether these statements were findings of fact or conclusions of law. Nor does the opinion of the trial court add anything to its findings on the issues of negligence and contributory negligence. Its only contribution to the understanding of the trial court's decision

is to suggest that the actual basis thereof was that the trial court believed that the occurrence in question was a legal accident for which, of course, the defendant would not be liable (Tr. 112, 114). Here again, there is no indication as to the subsidiary facts which formed the basis for this conclusion.

Faced with this problem, the Court of Appeals, significantly, does not cite a single case or discuss a single principle of law. Its opinion, 234 F. (2d) 817 (Appendix B), merely recites the findings of the trial court with respect to defendant's negligence and plaintiff's failure to prove that she was in the exercise of due care. It then refers to the "clearly erroneous" rule contained in Rule 52 (a) of the Federal Rules of Civil Procedure, reviews the evidence, refers to the conflicts in testimony, and concludes that the findings of fact are not "clearly erroneous". In so doing, it ignores entirely the trial court's finding with respect to "accident", fails to consider whether the findings are sufficient to meet the requirement of Rule 52 (a) that the court "shall find *the facts* specially", fails to consider whether these findings present mixed questions of law and fact and are therefore, insofar as they reflect an erroneous view of the law, subject to review without reference to the "clearly erroneous" rule. Consequently, the opinion below fails to consider the legal issues involved.

2. Although this Court has never passed upon the sufficiency of findings of fact in a negligence case, the decision below invoking the "clearly erroneous" doctrine to sustain the findings of the trial court conflicts with the standards laid down for findings of fact by the decisions of this Court in other types of litigation.

Kelly v. *Everglades District*, 319 U. S. 415 (1943), applied Federal Rule 52 (a) to a proceeding for reorganization of a drainage district under the Bankruptcy Act. This

Court reversed the decision of the court below and remanded the case because the findings of fact were insufficient to indicate the factual basis for the ultimate conclusion. The court stated, at page 420 of the opinion, that Rule 52 (a) required findings, in such detail and exactness as the case permitted, of *subsidiary* facts on which the ultimate conclusion could be legitimately based.

At the same term, the Court, in *Schneiderman* v. *United States,* 320 U. S. 118, 129-30 (1943), rejected a general conclusion of ultimate fact unaccompanied by findings of subsidiary fact in a denaturalization case because it was impossible to tell upon what underlying facts the court below relied in arriving at its decision.

In these cases, this Court relied upon its holdings in *Group of Investors* v. *Milwaukee R. Co.,* 318 U. S. 523, 538-9 (1943) (a railroad reorganization case) and *Interstate Circuit, Inc.* v. *United States,* 304 U. S. 55 (1938) (involving former Equity Rule 70½ containing the same standards). In the latter case, the Court said:

> "The statements in the decree that in making the restrictive agreements the parties had engaged in an illegal conspiracy were but ultimate conclusions and did not dispense with the necessity of properly formulating the underlying findings of fact."

The analogy between a statement that the agreements constituted an "illegal conspiracy" and the statements in the findings of the trial court in this case that plaintiff had not shown "due care on her own behalf" and that plaintiff's injuries were not caused by any "act of the said agent of the defendant" (Tr. 114), is obvious and needs no further exposition. The latter represent ultimate conclusions in a negligence case.

However, it may be argued that a negligence case does not permit the same degree of exactness and certainty

of findings as the questions of fact presented in the authorities previously cited. To illustrate the fallacy of such a contention, petitioner respectfully directs this Court's attention to the findings of fact in the opinions of the Courts of Appeals in the cases of *Maragakis* v. *United States,* 172 F. (2d) 393, 395 (C. A. 10th, 1949) and *Western Union Telegraph Co.* v. *Bromberg,* 143 F. (2d) 288, 290-1 (C. A. 9th, 1944). The *Western Union* case is particularly significant in that the factual situation was closely analogous to the instant case in that it involved the liability of the defendant for the action of its messenger in turning from the desk in a hotel lobby and colliding with Mr. Bromberg who was standing behind her. In the *Maragakis* case the finding of ultimate fact involved an erroneous view of the applicable law, and precisely because the trial court, adhering to correct procedure, made findings of subsidiary facts the error was readily apparent and could be corrected by the Court of Appeals.

In addition to the above cases exemplifying proper findings of fact, the decisions of Courts of Appeals of other circuits, unlike the opinion in the case at bar, also expressly require subsidiary findings of fact. In *Knapp* v. *Imperial Oil & Gas Products Co.,* 130 F. (2d) 1, 3 (C. A. 4th, 1942), an action for breach of contract, the court found that there were no contracts between the plaintiff and the defendant, that the agent of the defendant alleged to have made the contracts was not authorized to make such contracts and that plaintiff's regular duties included the actions alleged to be the subject matter of the special contracts. On review, the Court of Appeals held that these were general findings and not sufficient to comply with the requirements of Rule 52 (a). Certainly, these findings are more explicit and detailed with respect to the issues in an action for breach of contract than are the findings of the trial court in this case with respect to the issues

in a negligence action. See also *Skelly Oil Co.* v. *Holloway*, 171 F. (2d) 670, 673 (C. A. 8th, 1948).

The decision below likewise conflicts in principle with the holding in *Great Atlantic & Pacific Tea Co.* v. *Jones*, 177 F. (2d) 166, 167 (C. A. 3rd, 1949), an action for personal injuries sustained by a customer in defendant's store when a box fell upon her. In affirming the judgment of the court below, the Court of Appeals relied upon the subsidiary findings of fact and recited them in its opinion and characterized the finding that the injuries were the result of the failure of the defendant's employee to use due care as a conclusion, which in this case was properly supported by subsidiary findings.

Although involving a review of the findings of an administrative agency rather than the application of Rule 52 (a), the decision in *Saginaw Broadcasting Co.* v. *Federal C. Com.*, 96 F. (2d) 554, 559-561 (C. A. D. C., 1938) adopts a view as to the nature of findings of fact which is in accord with the foregoing decisions and contrary to the decision in the case at bar. In that case, Judge Stephens said:

> "We ruled in *Missouri Broadcasting Corporation* v. *Federal Communications Commission*, 94 F. 2d 623, 1937, and again in *Heitmeyer* v. *Federal Communications Commission*, 68 App. D. C. 180, 95 F. (2d) 91, 1937, that findings of fact in the broad terms of public convenience, interest or necessity, the criterion set up by Section 319 (a) of the Act, were not sufficient to support an order of the Commission. We now rule that findings of fact, to be sufficient to support an order, must include what have been above described as the basic facts, from which the ultimate facts in terms of the statutory criterion are inferred."

Under the decisions of this Court, the rule requiring that there be subsidiary findings to support ultimate find-

ings, prevalent in other Circuits, represents the correct principle to be followed. Because of the importance of the problem, the departure from this principle sanctioned by the Court of Appeals for the Seventh Circuit in this case should be corrected by this Court.

3. The decision of the Court of Appeals likewise implicitly conflicts with the decisions of this Court and the Courts of Appeals for other Circuits in neglecting to review the errors of law involved in the findings of the district court in this case. As Justice Frankfurter pointed out in *Baumgartner* v. *United States,* 322 U. S. 665, 670 (1944):

> "The conclusiveness of a 'finding of fact' depends upon the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding the so-called ultimate facts more clearly implies the application of standards of law."

In *United States* v. *Gypsum Co.,* 333 U. S. 364 (1948), an anti-trust case, this court held, with respect to Finding 118 and its subsidiary findings, that insofar as the ultimate finding was based upon an erroneous interpretation of the prior decisions of this Court it was reviewable without reference to the "clearly erroneous" standard.

In accord with these principles, various Courts of Appeals have held that where an ultimate finding of fact involves the application of a standard of law, the determination of a mixed question of law and fact, or an error of law, the "clearly erroneous" rule is not applicable to the review of the legal conclusion embodied in such findings, *Galena Oaks Corporation* v. *Scofield,* 218 F. (2d) 217, 219 (C. A. 5th, 1954); *Lehmann* v. *Acheson,* 206 F. (2d) 592, 594 (C. A. 3rd, 1953); *Bach* v. *Friden Calculating*

Mach. Co., 155 F. (2d) 361, 364 (C. A. 6th, 1946); *Maragakis* v. *United States*, 172 F. (2d) 393, 395 (C. A. 10th, 1949); *Owen* v. *Commercial Union Fire Insurance Co. of New York*, 211 F. (2d) 488, 489 (C. A. 4th, 1954), and *United States* v. *Armature Rewinding Co.*, 124 F. (2d) 589, 591 (C. A. 8th, 1942).

The opinion in the instant case does not distinguish between findings which are pure questions of fact and findings which involve questions of law but merely relies upon the "clearly erroneous" rule and the presence of conflicting testimony, despite the fact that errors of law were urged on appeal.

It has been repeatedly held that the law of the place where the accident occurred has been adopted as controlling for the purpose of determining liability under the Federal Tort Claims Act, 28 U. S. C. A. 1346 (b), *Air Transport Associates* v. *United States*, 221 F. (2d) 467, 471 (C. A. 9th, 1955); *United States* v. *Brooks*, 176 F. (2d) 482, 483 (C. A. 4th, 1949), and *Maragakis* v. *United States*, 172 F. (2d) 393, 395 (C. A. 10th, 1949). From the findings of the trial court it is apparent that the trial judge was influenced by his conclusion that this occurrence was an "accident". This issue was ignored by the Court of Appeals. It is likewise apparent that the trial court (if not the Court of Appeals) based his conclusions as to lack of the negligence of the defendant upon the fact that its servant, Sam Wallace, could not be expected to foresee this particular occurrence. The Court of Appeals supported the conclusion of the trial court that plaintiff did not prove freedom from contributory negligence upon the fact that the trial court may have thought that she was looking at the clock shortly before the accident occurred, although the trial court made no such finding respecting looking at the clock.

Each of the conclusions—respecting "accident", "foreseeability" and "care of the plaintiff"—was erroneous as a matter of Illinois law, and the Court of Appeals for the Seventh Circuit, by holding itself foreclosed from considering these errors under the "clearly erroneous" rule, has promulgated a decision which implicitly conflicts with the decisions of this Court and the Courts of the other Circuits heretofore cited.

With respect to the applicability of the doctrine of legal accident, the issues made by the pleadings were in essence those of negligence and contributory negligence (Tr. 4-5). Likewise, the evidence presented the issue as to whether the mail carrier was negligent in walking half way across the first floor corridor with his head turned back toward the elevator and not seeing the plaintiff until after the collision (Tr. 41, 43, 85, 86), and whether the plaintiff was looking forward and in the exercise of ordinary care for her own safety at the time of the accident (Tr. 13, 33, 34). *Smith* v. *Johnson,* 2 Ill. App. (2d) 315, 320, 120 N. E. (2d) 58 (1954); *Cornwell* v. *Bloomington B. M. Assn.,* 163 Ill. App. 461, 467 (1911); *Streeter* v. *Humrichouse,* 357 Ill. 234, 244, 191 N. E. 694 (1934) and *Peters* v. *Madigan,* 262 Ill. App. 417, 424 (1931) all hold that where the only issues under the evidence are the negligence of the respective parties, these questions may not be avoided by applying a theory of accident. Within any view of the evidence it was impossible to make a subsidiary finding of fact that would support the conclusion of "accident". Therefore, the conclusion was error.

With respect to the question of "foreseeability", the Illinois decisions hold that it is not necessary that the defendant or its agent be able to foresee the particular act in question. It is sufficient that he should have been able to anticipate that some injury or harm might follow from his conduct, *City of Dixon* v. *Scott,* 181 Ill. 116, 119,

54 N. E. 897 (1899); *Illinois C. R. R. Co.* v. *Siler,* 229 Ill. 390, 394, 82 N. E. 362 (1907) and *Hartnett* v. *Boston Store of Chicago,* 265 Ill. 331, 334, 106 N. E. 837 (1914). The evidence most favorable to the defendant showed that Sam Wallace took one or two steps into the corridor as he left the elevator and did not see the plaintiff until she was in the act of falling. Certainly, a person not looking ahead as he was walking in the first floor corridor of a busy office building at ten minutes to nine in the morning could be expected to anticipate that he might collide with someone.

With respect to plaintiff's contributory negligence, the findings, and the opinion below, are erroneous as a matter of Illinois law on two grounds. In the first place, it is not negligence for a pedestrian, in an ordinary situation where the only danger is the negligence of another, to assume that others will not act negligently. If he attends to what is in front of him, he is using ordinary care even if he fails to see something approaching at right angles, *Crawley* v. *Jermain,* 218 Ill. App. 51, 53 (1921); *Moran* v. *Gatz,* 390 Ill. 478, 486, 62 N. E. (2d) 443 (1945), or momentarily glances away, *Trojan* v. *City of Blue Island,* 10 Ill. App. (2d) 47, 51, 134 N. E. (2d) 29 (1956); *Pollard* v. *Broadway Cent. Hotel Corp.,* 353 Ill. 312, 320; 187 N. E. 487 (1933). This principle is determinative of the Court of Appeals' comments with respect to the evidence that petitioner glanced at the clock. Moreover, under Illinois law, proximate cause is a necessary element of contributory negligence. The Illinois courts have held that the plaintiff may have been negligent, but if his negligence only furnished a condition that made the occurrence possible or likely to happen, plaintiff's negligence will not bar recovery, *Johnson* v. *Gustafson,* 233 Ill. App. 216, 224 (1924); *Lerette* v. *Director General,* 306 Ill. 348, 352, 137 N. E. 811 (1923); see also *Hestand* v. *Clark,* 345 Ill. App. 480, 485, 103 N. E.

(2d) 652 (1951); *Merlo* v. *Public Service Co.*, 381 Ill. 300, 318, 45 N. E. (2d) 665 (1943) and *Schmidt* v. *Anderson*, 301 Ill. App. 28, 42, 21 N. E. (2d) 825 (1939). The trial court made no finding with respect to this issue of proximate cause, nor is the omission supplied in the conclusions of law.

The foregoing demonstrates that there is an inherent conflict between the decision of the Court of Appeals for the Seventh Circuit in this case and the rules applied by this Court and the other Circuits in one of two respects. Either the Court of Appeals erroneously assumed that it had no right to pass upon the errors by law clearly apparent in the trial court's findings or, if it did not make such an assumption, it ignored the express statutory command of the Federal Tort Claims Act that required it to determine such issues in accordance with the law of Illinois. In either event, its decision is necessarily in conflict with the decisions of the other Circuits and the applicable decisions of this Court. This substantial departure from the accepted standards of jurisprudence, as reflected in those decisions, should be corrected by this Court so that it will not affect the substantial number of similar cases to be litigated in the Seventh Circuit in the future.

4. Although the decisions of this Court and of the various Courts of Appeals heretofore have considered the construction of the important provisions in Rule 52(a) that the trial court, sitting without a jury, shall "find the facts specially" and that such findings of fact shall not be reversed upon appeal unless "clearly erroneous", and have discussed standards which should guide a trial court in making findings, it is apparent from a study of the decisions cited in the previous reasons for granting this petition, that there is need for a further elaboration of these standards. The problem of what subsidiary facts should be included in the findings required by this rule

has been of considerable concern to trial judges (See: Memorandum of Mr. George F. Longsdorf quoted in footnote 10 of Yankwich, *Findings in the Light of the Recent Amendments,* 8 F. R. D. 271, 285). The benefits which would enure to the public and to the Federal Courts in their responsibility for the administration of justice would amply repay any time and effort spent in setting forth a simple and plain statement of the type of subsidiary findings desired.

With respect to the trial judge, formulating adequate subsidiary findings of fact furnishes him with what is almost a self-correcting procedure so that it is difficult to ignore a controlling fact, *United States* v. *Forness,* 125 F. (2d) 928, 943 (C. A. 2d, 1942). If a principle of law is erroneously applied to the facts, the error is evident on review and often can be corrected without the necessity of a retrial of the issues (Cf. *Matton Oil Transfer Corp.* v. *The Dynamic,* 123 F. (2d) 999, 1001 (C. A. 2d, 1941); see also discussion of *Maragakis* v. *United States,* 172 F. (2d) 393, 395 (C. A. 10th, 1949), page 11, *supra*).

With respect to the public, formulating adequate subsidiary findings of fact is the only way to carry out the reform intended by Rule 52(a) that there might be a review of questions of fact as well as questions of law in non-jury actions at law, (Yankwich, *Findings in the Light of the Recent Amendments,* 8 F. R. D. 271, 289). Wholly general findings, such as were made in the case at bar, defeat every benefit intended by this rule.

Since the rule itself and the decisions do not furnish a clear and authoritative guide for determining the sufficiency of findings of fact, this case presents questions with respect to the interpretation of the rule and the administration of justice in the Federal Courts of such public importance that they call for the exercise of the supervisory power of this Court. Only an opinion of this Court

especially directed to Rule 52(a) will settle the problems in its construction.

In these days of congested trial court calendars it is especially important that the procedure in non-jury cases inspire confidence in its ability to do justice, so that litigants may be encouraged voluntarily to forego their right to trial by jury. A plain requirement of subsidiary findings of fact would be a big step in this direction. See *Proceedings Of The Attorney General's Conference On Court Congestion And Delay In Litigation, May 21 and 22, 1956.*

In *Anderson* v. *Yungkau,* 329 U. S. 482 (1947) and *Hickman* v. *Taylor,* 329 U. S. 495, 497 (1947), the Court granted a writ of certiorari for the express purpose of settling the construction of important provisions of the Federal Rules of Civil Procedure. The nature of the Court's responsibility in this respect was clearly expressed by Mr. Justice Black in *Klapprott* v. *United States,* 335 U. S. 601 (1949) when he said, at page 611 of the opinion:

> "Thus it appears that statutes and rules have largely left to judicial determination the type of cases in which hearing and proof should precede default judgment. *In this situation it is the final responsibility of this court to formulate the controlling rules for hearings and proof.*" (Emphasis supplied.)

CONCLUSION.

A plaintiff pedestrian is entitled to recover where another pedestrian negligently collides with him, *Western Union Telegraph Co.* v. *Bromberg,* 143 F. (2d) 288 (C. A. 9th, 1944); *Tighe* v. *Ad Chong,* 44 Cal. App. (2d) 164, 112 P. (2d) 20 (1941). Here a seriously and permanently injured plaintiff was deprived of her right to recover or, at least, of her right to have her case decided according to the procedures prescribed in the Federal Rules and according to the substantive tort law of Illinois. The

reason for establishing good procedures and for insisting, day to day, on their being followed is that experience attests that there is no other way to do justice in a court system.

Far more serious than its immediate effect upon the petitioner, however, is the harmful potential inherent in this decision for future actions in both the Seventh Circuit and the other Circuits in a substantial portion of the litigation which will come before the United States District Courts. Such potential harm can be avoided only by this Court's granting the petition in this case and authoritatively settling, at least for negligence cases, the extent to which the trial courts should make subsidiary findings of fact, and the scope of the "clearly erroneous" doctrine embodied in Rule 52(a) as applied to such cases.

For the above reasons, petitioner respectfully prays that the writ of certiorari herein prayed for be granted, and that, upon review, this cause be reversed and remanded for the correction of the findings of the district court or for a new trial.

Respectfully submitted,

PETER FITZPATRICK,
Suite 1110,
10 South LaSalle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

GERALD M. CHAPMAN,
Of Counsel.

APPENDIX "A".

Memorandum, Findings of Fact and Conclusions of Law of the District Court.

MEMORANDUM.

The plaintiff, Josephine Kus, instituted this action under the Federal Tort Claims Act, 28 U. S. C. Section 1346(b), to recover damages sustained as a result of a collision and fall, which, it is alleged, was caused by one Sam Wallace, a mail carrier employed by the defendant. From the evidence it appears that on January 11, 1952, at about 8:50 A. M., she was walking in the lobby of the Marshall Field Annex Building in the City of Chicago, and that on this occasion she collided with Wallace, fell to the floor and suffered severe personal injuries. The Government offered no evidence to dispute the injuries of the plaintiff.

Counsel for both parties have filed excellent briefs and arguments in support of their respective positions. In his memorandum counsel for the plaintiff has correctly stated the issues: 1. Is a master liable for the negligence of his servant who is using no instrumentality of locomotion furnished by the master? 2. Was the mail carrier guilty of negligence which proximately caused the injuries to the plaintiff? 3. Was the plaintiff exercising ordinary care for her own safety?

The first question put by counsel for the plaintiff must be answered in the affirmative. Hence, there remain two issues for determination by the court. The court heard the testimony of the witnesses in person and has carefully studied the transcript of record together with the memoranda of counsel for the parties. While it is regrettable

that the plaintiff has suffered severe injuries in this accident, the court is of the opinion that her injuries and damages were not caused by any act of the agent of the defendant. Moreover, the court feels that the plaintiff has failed to sustain the burden of proof which requires, among other things, that she establish due care on her own behalf. The evidence, in the opinion of the court, clearly indicates that the occurrence was an accident, and the mere happening of an accident is no evidence of negligence. In the opinion of the court, Wallace could not reasonably have expected the accident to have occurred. The books are full of cases where persons have been held not negligent for not guarding against a harmful event on the ground that they need not reasonably have expected it to happen.

Counsel for the defendant will please submit findings of fact and conclusions of law reflecting the views herein expressed, together with a judgment order in favor of the defendant and against the plaintiff. These documents will be submitted for signature on or before June 20, 1955.

JULIUS J. HOFFMAN,
Judge.

JJH CB

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This action having been commenced by the filing of a complaint on November 21, 1952, which said complaint was amended on February 1, 1955; and an Answer having been duly filed herein on February 10, 1953, which said Answer stood to the complaint as amended; and the cause coming on for trial before this court, sitting without a jury, on January 31, 1955, and continuing through February 1, 1955; and the court having heard the testimony of witnesses and the arguments of respective counsel,

Finn & Fitzpatrick, by Peter Fitzpatrick, appearing on behalf of plaintiff, and R. Tieken, United States Attorney for the Northern District of Illinois by Anna R. Lavin, one of his Assistants, appearing on behalf of the defendant; and written briefs and arguments having been thereafter filed by the parties in support of their respective positions; and due consideration having been had thereon, the following Findings of Fact and Conclusions of Law are hereby made:

Findings of Fact.

1. That plaintiff is a resident of the City of Chicago, in the Northern District of Illinois.

2. This action is brought against the defendant, United States of America, under the provisions of Title 28 U. S. C. 1346(b).

3. That on January 11, 1952, at about 8:50 A. M., plaintiff, Josephine Kus, was a pedestrian in the Marshall Field Annex Building, located at 25 East Washington Street, Chicago, Illinois.

4. That one Sam Wallace, an employee of the defendant, United States of America, and engaged in its business, was also a pedestrian at the same time and in the same place.

5. That at the same time and in the same place, the said Josephine Kus collided with the said Sam Wallace, and suffered severe personal injuries.

6. That the injuries and damages sustained by the said Josephine Kus were not caused by any act of the said agent of the defendant.

7. That the said Josephine Kus has not shown due care on her own behalf.

8. That the occurrence, as a result of which plaintiff suffered the said injuries, was an accident.

9. That the said Sam Wallace could not reasonably have expected the accident to occur.

Upon the foregoing Findings of Fact, it is concluded:

Conclusions of Law.

1. That this court has jurisdiction of the cause herein under and by virtue of the provisions of sections 1346(b) and 2671, et seq., of Title 28, United States Code.

2. That the injury and damage sustained by the plaintiff did not result from any negligent act of the defendant, its agents, servants, or employees.

3. That the plaintiff has not shown that she was in the exercise of due care in her own behalf.

4. That the plaintiff take nothing by her suit, and that the defendant be hence dismissed at plaintiff's costs.

Enter:

JULIUS J. HOFFMAN,

Dated: June 20th, 1955. *Judge.*

APPENDIX "B".

Opinion and Judgment of United States Court of Appeals for the Seventh Circuit and Order Denying Rehearing.

Before LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SWAIM, *Circuit Judge.* The plaintiff, Josephine Kus, brought this action for damages for personal injuries against the United States under the Federal Tort Claims Act, 28 U. S. C. A. Section 1346(b).

The complaint alleged that while plaintiff was walking in the lobby of the Marshall Field Annex Building in Chicago, Illinois, Sam Wallace, while acting within the scope of his employment as a mail carrier for the United States, carelessly and negligently collided with the plaintiff and knocked her down onto the floor of the building lobby, thereby seriously and permanently injuring her.

The defendant's answer denied that the mail carrier, Wallace, was negligent and denied that Wallace's negligence was the proximate cause of the plaintiff's injuries. The answer alleged that any injury or damage to the plaintiff was caused by her own carelessness and negligence.

The trial court decided that the plaintiff's fall and injuries were not caused by the negligence of the mail carrier, and that the plaintiff had not shown that she was using due care in her own behalf. The court therefore entered judgment for the defendant.

The trial court saw and heard the witnesses testify. Essential parts of the testimony of the various witnesses were contradictory. This court may not set aside findings

of fact off a trial court unless such findings are clearly erroneous. Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A.

At the time of the accident the plaintiff was on her way to the shop where she worked on one of the upper floors of the building in the lobby of which the accident occurred. She was due at her work at 9:00 A. M. The collision between the plaintiff and Wallace, the mailman, occurred at 8:50 A. M. in the street floor corridor of the building. This corridor extends east and west; and on the south side of the corridor, at the east end thereof, there is a cigar and candy counter, then a mail box which extends out from the south wall of the corridor about two feet and then a row of eight elevators. The corridor is twelve to fifteen feet wide.

On the morning in question the plaintiff entered the building at the east entrance of the corridor and proceeded west toward the elevators. Plaintiff said that she was walking in about the center of the lobby; that the collision occurred in front of the second elevator at a point about two or three feet west of the first elevator; that just prior to the collision with the mailman she had heard the door of the first elevator click, signifying that it was down. Plaintiff testified that she took only a couple more steps and was struck from behind on her left side and fell to the floor. She said that as she fell she heard Wallace say, "I am awfully sorry, I didn't mean to do that." At the time of the accident plaintiff was walking west toward the third elevator which was ready to admit passengers. Plaintiff said that she did not see Wallace before she was knocked to the floor. After the accident Wallace and the elevator starter helped the plaintiff up and placed her on a chair in the lobby.

On cross-examination the plaintiff testified that as she

passed the second elevator she was looking and walking directly west, that she continued to look in the direction she was walking and that she "was not looking about at all." Plaintiff denied that at the time of the accident she told Carl Hendrey, the elevator starter, that she "had just looked away for a moment, to look at the clock." Plaintiff said that in the collision Wallace struck her left side behind her left shoulder, and that she then fell "right in the spot" where she was walking.

Carl Hendrey, the elevator starter who was the only eye witness to the collision, testified that at the time of the accident he was standing by the third elevator from the east entrance of the building and was loading passengers in that elevator. Hendrey testified that he saw the plaintiff and Wallace "coming together" but that "it was too late to holler or anything.' He said that the plaintiff and Wallace were then about three and a half feet apart and that he saw them both at the same time. Hendrey said that the plaintiff was then facing west and was walking toward the west, that Wallace was looking southwest and was walking toward the north, and that Wallace's right shoulder and plaintiff's left shoulder collided. Hendrey testified further that neither party was walking very fast and that plaintiff was moving toward elevator No. 3 which was the second elevator west of the elevator from which Wallace came out into the corridor. He said that the plaintiff had to pass the passengers, including Wallace, who were then unloading from elevator No. 1. Hendrey said that he looked at elevator 1 to see who was getting out and that he saw Wallace step out and take "this sideward step, this sideward motion of his." He said that the shoulders of the plaintiff and Wallace did not strike squarely because "Mr. Wallace was sort of on that angle." Hendrey testified that in his report of the accident—a

report he was required to make to the management of the building—he stated: "Miss Kus remarked that she was looking at the clock as she came into the building and didn't see the mailman coming out of the elevator."

Sam Wallace, the mail carrier, testified that he had been carrying mail in the Marshall Field Annex Building since 1951; that on the morning of the accident, after he had completed his first mail delivery in the building, he came down in the elevator with two other men and the elevator operator; that he stepped out into the lobby; and that the next thing he knew the plaintiff was against his right arm and shoulder. Wallace said that he was carrying an empty mail bag over his left shoulder and that there was nothing in the lobby of the building to impede his vision as he came out of the elevator except a mail box which only extended out about two feet from the south wall of the corridor. He said that as far as he could remember he was looking straight ahead as he came out of the elevator and that he did not see the plaintiff as she approached. Wallace testified that in his collision with plaintiff his right side, right shoulder and right arm were struck, and that he "imagined" that plaintiff's chest was struck but that he could not say positively. Wallace said that he tried to break the plaintiff's fall and then apologized and told her how sorry he was. He said that plaintiff then said that she was sorry too, that "she had just looked up at the clock for a fraction of a second and there I was." Wallace said that it appeared to him that when Miss Kus hit him she bounced back and lost her balance. He said that he did not have an opportunity to see where the plaintiff was looking as she approached him. On cross-examination Wallace admitted that in a deposition taken prior to the trial he stated that he had not seen the plaintiff until she had fallen to the floor. Wallace also testified that as he left the ele-

vator he was walking straight north and that he was looking in that same direction until he and the plaintiff collided.

On all of the contradictory testimony found in this record we cannot say that the findings of the trial court in this case were clearly erroneous. It is true that at the trial the plaintiff insisted that she was walking and looking straight ahead as she entered the building and came down the corridor. It is also true that at the trial Carl Hendrey, the only eye witness to the accident, testified that the plaintiff was looking in the direction in which she was walking. But Hendrey's official report of the accident, made on the day of the accident, contained the statement: "Miss Kus remarked that she was looking at the clock as she came into the building and didn't see the mailman coming out of the elevator." And, as we have pointed out above, Mr. Wallace also testified that the plaintiff, at the time of the accident, said that she had just looked up at the clock.

This accident occurred on January 11, 1952, and the case was tried in August 1955. It is understandable that the trial judge may have given more weight to the official report of the accident made by Hendrey on the day of the accident than to the statements made by the plaintiff and by Hendrey during the trial. We cannot say that the findings of the trial court were clearly erroneous.

The judgment of the District Court must be, and it is

AFFIRMED.

Friday, July 6, 1956

Before

Hon. WALTER C. LINDLEY, *Circuit Judge,*
Hon. H. NATHAN SWAIM, *Circuit Judge,*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge.*

JOSEPHINE KUS,
Plaintiff-Appellant,
No. 11604 *vs.*
THE UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record for the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

Wednesday, August 8, 1956

Before

Hon. WALTER C. LINDLEY, *Circuit Judge,*
Hon. H. NATHAN SWAIM, *Circuit Judge,*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge.*

JOSEPHINE KUS,
Plaintiff-Appellant,
No. 11604 *vs.*
THE UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in the above entitled cause be, and the same is hereby, DENIED.

APPENDIX "C".

Correspondence With Administrative Office of the United States Courts.

(Letterhead of Administrative Office of the United States Courts, Washington 13, D. C.)

October 26, 1956.

Peter Fitzpatrick, Esq.
Finn & Fitzpatrick
Suite 1110 Otis Building
10 South LaSalle Street
Chicago 3, Illinois

DEAR MR. FITZPATRICK:

I am replying to your letter of October 23 to Mr. Chandler, requesting information concerning the volume of cases in the United States District Courts.

In many instances it is not possible to determine at the time of filing whether a particular suit will result in a jury or non-jury trial. Of course in regard to the Tort Claims Act, the statute requires a non-jury trial. The enclosed table shows the number of Tort Claims Act suits filed since 1947 and the number of non-jury trials begun for nine of the last ten years.

This information is published in great detail in the Annual Report of the Director of this Office. For your information I am inclosing a copy of the 1955 report. Copies of the printed 1956 report will be available after the first of the year.

I am inclosing a table showing the cases filed by nature of suit during the fiscal year 1956.

Yours sincerely,

/s/ WILL SHAFROTH
Will Shafroth.

Enclosures.

FEDERAL TORT CLAIMS ACT SUITS COMMENCED AND CIVIL NON-JURY TRIALS BEGUN IN THE UNITED STATES DISTRICT COURTS DURING THE FISCAL YEARS 1947-1956.

Fiscal Year	Federal Tort Claims Act Suits Commenced[1]	Civil Non-Jury Trials Begun (All Cases)[2]
1947.....	676	3,989
1948.....	1,503	4,204
1949.....	1,249	4,149
1950.....	1,058	4,276
1951.....	736	4,492
1952.....	874	4,179
1953.....	1,088	4,272
1954.....	1,154	4,182
1955.....	894	4,110
1956.....	955	....[3]

(1) Source: Table C-2 of the Annual Report of the Director of the Administrative Office of the United States Courts.

(2) Source: Table C-7 of the same report.

(3) The information concerning the number of trials in 1956 is not available at this time.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 553

JOSEPHINE KUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion and the findings of fact and conclusions of law of the district court (Pet. 21–24) are not reported. The opinion of the court of appeals (Pet. 25–29) is reported at 234 F. 2d 817.

JURISDICTION

The decision of the court of appeals was entered on July 6, 1956 (Pet. 30) and a timely petition for rehearing was denied on August 8, 1956 (Pet. 30). The petition for a writ of certiorari was filed on November 5, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and 28 U. S. C. 2101 (c).

QUESTION PRESENTED

1. Whether, in the circumstances of this case, the district court's findings of fact were sufficiently specific to comply with the requirement of Rule 52 (a) of the Federal Rules of Civil Procedure that "the court shall find the facts specially."

2. Whether petitioner's assertion of deficiencies in the trial court's findings of fact, even if true, establishes that there was substantial prejudice.

RULES INVOLVED

The pertinent provisions of the Federal Rules of Civil Procedure are as follows:

> Rule 52. FINDINGS BY THE COURT.
>
> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and con-

clusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

* * * * *

Rule 61. HARMLESS ERROR.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT

Petitioner was injured when she and one Sam Wallace, a United States mail carrier, collided in the first floor lobby of the Marshall Field Annex Building in Chicago. She brought this suit under the Federal Tort Claims Act (28 U. S. C. 1346 (b)), and, after a trial, the district court, sitting without a jury, denied recovery. The court in its memorandum opinion stated that the case involved three questions: Whether the Government would be liable if the mail carrier was negligent; whether the mail carrier in fact was guilty of negligence which proximately caused plaintiff's injuries; and whether plaintiff was exercising due care for her own safety (Pet. 21). Holding that the Government would be liable for negligence of the car-

rier (Pet. 21), the court proceeded to resolve the two issues of negligence against the plaintiff. The judge stated that he had "heard the testimony of the witnesses in person and ha[d] carefully studied the transcript of record together with the memoranda of counsel for the parties" (Pet. 21), and that he had concluded that plaintiff's "injuries and damages were not caused by any act of the agent of the defendant." The opinion continued (Pet. 22):

> * * * Moreover, the court feels that the plaintiff has failed to sustain the burden of proof which requires, among other things, that she establish due care on her own behalf. The evidence, in the opinion of the court, clearly indicates that the occurrence was an accident, and the mere happening of an accident is no evidence of negligence. In the opinion of the court, Wallace could not reasonably have expected the accident to have occurred. * * *

On the basis of this opinion, the court entered findings of fact and conclusions of law. The court's findings set forth the time and place of the accident, and the persons involved, and then stated (Pet. 23–24):

* * * * *

> 5. That at the same time and in the same place, the said Josephine Kus collided with the said Sam Wallace, and suffered severe personal injuries.
>
> 6. That the injuries and damages sustained by the said Josephine Kus were not caused by any act of the said agent of the defendant.
>
> 7. That the said Josephine Kus has not shown due care on her own behalf.

8. That the occurrence, as a result of which plaintiff suffered the said injuries, was an accident.

9. That the said Sam Wallace could not reasonably have expected the accident to occur.

From these findings the court concluded (Pet. 24):

* * * * *

2. That the injury and damage sustained by the plaintiff did not result from any negligent act of the defendant, its agents, servants, or employees.

3. That the plaintiff has not shown that she was in the exercise of due care in her own behalf.

* * * * *

Petitioner appealed to the Court of Appeals for the Seventh Circuit. That court wrote a detailed opinion (Pet. 25–29) and concluded from its examination of the record that the district court's decision should be sustained. In her petition for rehearing, which was denied, petitioner for the first time advanced the contention that the district court's findings of fact fail to comply with the requirement of Rule 52 (a) (*supra*, p. 2) that the trial court find the facts "specially." This contention forms the basis of petitioner's present application for a writ of certiorari.

ARGUMENT

This is a simple negligence action in which petitioner, barred from obtaining further review of the factual issues by the two-court rule (see *Comstock* v. *Group of Investors*, 335 U. S. 211, 214), seeks reversal of the decisions below by questioning the legal suf-

ficiency of the district court's findings. Contrary to petitioner's contention, no issue of general importance is presented. Both this Court and the courts of appeals have, in numerous decisions, set out clear and consistent standards by which the sufficiency of factual findings are to be judged.[1] The only question involved is whether the findings here comply with these standards and, we submit, there is no doubt that they do. Moreover, if there were any defects, they did not affect the substantial rights of the parties, and constituted no more than "harmless error." Rule 61 (*supra*, p. 3). Petitioner's substantive contentions received full and careful consideration by both courts below, and plainly warrant no further review by this Court.

1. The district court's findings of fact complied with Rule 52 (a). It is well settled that "the nature and degree of exactness of the findings required depends on the circumstances of the particular case."

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[1] See, *e. g.*, *Hatahley* v. *United States*, 351 U. S. 173, 182; *Dalehite* v. *United States*, 346 U. S. 15, 24, fn. 8; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 184; *Kelley* v. *Everglades District*, 319 U. S. 415, 420; *Mayo* v. *Canning Co.*, 309 U. S. 310, 316. For recent court of appeals decisions, including a number of Seventh Circuit cases, see, *e. g.*, *In re Cesari*, 217 F. 2d 424 (C. A. 7); *Gamewell Co.* v. *City of Phoenix*, 216 F. 2d 928, amended on other grounds, 219 F. 2d 180 (C. A. 9); *Carr* v. *Yokohama Specie Bank*, 200 F. 2d 251 (C. A. 9); *United States* v. *Trubow*, 196 F. 2d 161 (C. A. 9); *Desch* v. *United States*, 186 F. 2d 623 (C. A. 7); *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F. 2d 4 (C. A. 7); *Norwich Union Indemnity Co.* v. *Haas*, 179 F. 2d 827 (C. A. 7); *Oedekerk* v. *Muncie Gear Works*, 179 F. 2d 821 (C. A. 7); *Woods* v. *Oak Park Chateau Corp.*, 179 F. 2d 611 (C. A. 7); *Dearborn Nat. Casualty Co.* v. *Consumers Petroleum Co.*, 164 F. 2d 332 (C. A. 7). See also cases cited *infra*, pp. 7–9.

Kelley v. *Everglades District* 319 U. S. 415, 419. The rule "does not require the trial court to make findings on all the facts presented or to make detailed evidentiary findings; if the findings are sufficient to support the ultimate conclusion of the court they are sufficient." *Norwich Union Indemnity Co.* v. *Haas,* 179 F. 2d 827, 832 (C. A. 7). See also *Carr* v. *Yokohama Specie Bank,* 200 F. 2d 251, 255 (C. A. 9); *Oedekerk* v. *Muncie Gear Works,* 179 F. 2d 821 (C. A. 7); *Woods* v. *Oak Park Chateau Corp.,* 179 F. 2d 611 (C. A. 7); *Shapiro* v. *Rubens,* 166 F. 2d 659, 665 (C. A. 7). Moreover, formal findings are to be read in conjunction with the trial court's opinion, and the judgment will be upheld despite deficiencies in the findings if the opinion gives the court of appeals a clear understanding of the basis of decision.[2]

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[2] In *Klimkiewicz* v. *Westminster Deposit & Trust Co.*, 122 F. 2d 957, 958 (C. A. D. C.), certiorari denied, 315 U. S. 805, it was stated:

> Criticism is made of the District Court's findings of fact on the ground that they are mere statements of generalities or conclusions and do not meet the requirements of Rule 52 of the New Federal Rules, 28 U. S. C. A. following section 723c, but we think this criticism is not justifiable. The trial court is not required to make findings on all the facts presented and need only find such ultimate facts as are necessary to reach the decision in the case. *Penmac Corp.* v. *Esterbrook Steel Pen Mfg. Co.*, D. C., 27 F. Supp. 86, 93; *McGee* v. *Nee*, 8 Cir., 113 F. 2d 543. The judgment should stand if the opinion below gives the appellate court a clear understanding of the basis of the decision. *Goodacre* v. *Panagopoulos*, 72 App. D. C. 25, 110 F. 2d 716; *Brown* v. *Metropolitan Life Ins. Co.*, 69 App. D. C. 233, 100 F. 2d 98; *Societe Suisse Pour Valeurs De Metaux* v. *Cummings*, 69 App. D. C. 154, 99 F. 2d 387; *Shellman* v. *Shellman*, 68 App. D. C. 197, 95 F. 2d 108.

In the instant case, the district court's findings, supplemented by its memorandum opinion, informed the appellate court of the basis of the holding. The memorandum opinion sets forth the exceedingly simple factual background of the case, the three issues for decision, and the court's findings that in this pedestrian collision the mail carrier had not been negligent and the plaintiff had not exercised due care. Although these determinations, which the court incorporated in its findings, might have been spelled out in greater detail, they plainly were sufficiently explicit, in terms of the simple questions here involved, to support the ultimate conclusion of the court. There is no obligation on the trial court to summarize the evidence, *Norwich Union Indemnity Co.* v. *Haas, Oedekerk* v. *Muncie Gear Works, Woods* v. *Oak Park Chateau Corp., supra;* the findings need only be "a clear and concise statement of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred." *McGee* v. *Nee,* 113 F. 2d 543, 546 (C. A. 8); *Bowles* v. *Cudahy Packing Co.,* 154 F. 2d 891, 894 (C. A. 3); *Schilling* v. *Schwitzer-Cummins Co.,* 142 F. 2d 82, 84, fn. 10 (C. A. D. C.).

The adequacy of the findings is further established by the court of appeals' opinion itself. That court's exposition of the facts demonstrates that it had no difficulty in understanding the basis of the trial court's holding, and was able, upon its own independent appraisal of the evidence, squarely to affirm the denial of liability upon the grounds given by the trial court. Even if the findings were subject to criti-

cism, such defects as there may have been were cured by the appellate court's independent determination, made upon all of the evidence. Since findings of fact are but an intermediate step in the judicial process (*Hartford-Empire Co.* v. *Shawkee Mfg. Co.*, 147 F. 2d 532, 535 (C. A. 3), courts of appeals are not required to remand a case to the trial court where the findings are insufficient, but may, by their own examination of the record, determine whether sufficient factual basis exists for the lower court's holding. See, *e. g.*, *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F. 2d 4, 7, where the Seventh Circuit, although determining that the district court's memorandum opinion failed adequately to supply the findings and conclusions contemplated by Rule 52 (a), "nevertheless decided not to send the case back to the trial court so that additional findings could be filed * * *."

2. The decision of the court of appeals in this case does not depend upon the technical sufficiency of the district court's findings. The principle is well established that "[a] finding of fact is not the goal of the judicial process nor is it the relief which a court of justice accords a litigant. On the contrary, it is merely an intermediate step in the judicial process of deciding a controversy." *Hartford-Empire Co.* v. *Shawkee Mfg. Co., supra.* Whatever the technical deficiencies (if any) of the findings here, they plainly did not interfere with the proper resolution of this controversy. Notwithstanding petitioner's contentions to the contrary (Pet. 14–16), this case does not involve any complex questions of Illinois law, but turns upon

simple factual issues concerning the conduct of plaintiff and the mail carrier at the moment of their collision. The district court held, after a full hearing and with the benefit of testimony and photographic exhibits, that the mail carrier had not been negligent and that the plaintiff had not been exercising due care; and the opinion of the court of appeals (Pet. 25–29) demonstrates that the appellate tribunal made its own careful appraisal of the record and reached its own determination that the record as a whole supported the district court's denial of recovery on these grounds. Amplification of the district court's findings would only have supplied the court of appeals with information which it independently obtained from the record, and clearly would have had no effect on that court's decision to affirm.

Moreover, it is clear from petitioner's own actions that she was not prejudiced by the alleged deficiencies in the district court's findings. She made no motion in that court to amplify the findings, restricting her objections in the trial court to the contention that they were "erroneous and against the preponderance of the evidence." (Tr. 116–117). Similarly, she did not raise this issue in her Statement of Points (Tr. 121-122) or in her court of appeals' briefs. Not until she filed her petition for rehearing with the Seventh Circuit did she claim that the findings of the district court failed to comply with the requirements of Rule 52 (a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

DEC 1 1 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 553

JOSEPHINE KUS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

In this reply brief we shall not restate the arguments already set forth in our petition but shall deal only with the specific matters in respondent's brief which seem in most urgent need of correction.

Respondent's brief in opposition seeks to distract attention from consideration of the petition on the merits by invoking the "harmless error" and the "two-court" doctrine. Since the court of appeals did not make its own independent appraisal of the evidence, as we shall show in this reply, but limited its review of the evidence to considering whether the general findings were clearly

erroneous and did not review the errors of law, then the failure of the trial court to make specific findings[1] was not harmless error, and petitioner was denied a two-court review of the factual issues. Therefore we filed the petition for rehearing below.

The basis of respondent's argument, as expressed at pages 9 and 10 of the brief in opposition is:

> "Even if the findings were subject to criticism such defects as there may have been were cured by the appellate court's independent determination, made upon all of the evidence."
>
> "Whatever the technical deficiencies (if any) of the findings here, they plainly did not interfere with the proper resolution of this controversy. Notwithstanding petitioner's contentions to the contrary (Pet. 14-16), this case does not involve any complex questions of Illinois law, but turns upon simple factual issues * * * the opinion of the court of appeals (Pet. 25-29) demonstrates that the appellate tribunal made its own careful appraisal of the record and reached its own determination that the record as a whole supported the district court's denial of recovery on these grounds."

The first error is the assertion that the opinion indicates an independent appraisal of the record by the court of appeals. Respondent studiedly avoids any actual quotation from that opinion since it contains the following three statements, contrary to respondent's contention:

> "This court may not set aside findings of fact of a trial court unless such findings are clearly erroneous (Pet. 25-26).

---

1. The trial court failed to make any of these crucial findings: (1) to state what fact was the basis of its conclusion of "legal accident"; (2) to decide whether Sam Wallace backed out of the elevator across the corridor with his head turned in the opposite direction, and (3) to point out wherein Josephine Kus departed from the standard of ordinary care. Lacking them, the court of appeals erred in applying the "clearly erroneous" standard to the findings made.

> "On all of the contradictory testimony found in this record we cannot say that the findings of the trial court were clearly erroneous" (Pet. 29).

In the last sentence of the opinion, the court of appeals again repeats its holding, not that the evidence was such that, from its independent review of the record, it concluded that the trial court's decision was correct, but that "We cannot say that the findings of the trial court were *clearly erroneous*" (emphasis supplied) (Pet. 29).

Manifestly, the court of appeals felt itself bound by the clearly erroneous rule [Rule 52a], and nowhere in the opinion does it express, or even intimate, what view it might take of the evidence if this rule were inoperative. In a situation such as this where respondent assumes, or tacitly admits, that the findings were insufficient, petitioner was entitled either to sufficient findings before a decision on the merits or to an independent examination of the record by the court of appeals. This also is tacitly admitted by respondent.

Respondent states, at page 9 of its brief:

> "* * * courts of appeals are not required to remand a case to the trial court where the findings are insufficient, but may, by their own examination of the record, determine whether sufficient factual basis exists for the lower court's holding."

In support of this proposition, respondent cites *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F. (2d) 4 (C. A. 7th, 1950). However, respondent omits to state that, at page 6 of that opinion, the court of appeals based its conclusion upon its own examination of the record. This is in accord with the principle generally followed by the courts of appeals that, although a failure to make sufficiently "detailed" findings under Rule 52(a) is erroneous, it is not reversible where the record is clear and the court of appeals, *on its own examination of it*, can conclude that

the decision was correct.[2] Perhaps the most closely analogous situation is the decision in *Desch* v. *United States*, 186 F. (2d) 263 (C. A. 7th, 1951) where the court of appeals held that the findings in a negligence case were inadequate, reviewed the testimony, and reversed findings of negligence and contributory negligence, adverse to the plaintiff, without reference to the clearly erroneous rule, remanding the cause only for the determination of damages. In so doing the court said, at page 625:

> "The trial court should make such subsidiary findings of fact as will support the ultimate conclusion reached by the court. *Dearborn Nat. Casualty Co.* v. *Consumers Petroleum Co.*, 7 Cir., 164 F. 2d 332. Findings should be sufficient to indicate the factual basis for the conclusions of the court. *Kelly, et al.* v. *Everglades Drainage District*, 319 U. S. 415, 420, 63 S. Ct. 1141, 87 L. Ed. 1485. *In as much as such factual findings are missing, we have carefully read all of the evidence in this record. We are convinced that the court's determination that the driver of the truck was not negligent is not sustained.*" (Emphasis ours.)

No such language appears in the opinion in this case. Instead, as noted previously, the court of appeals repeatedly states that the basis of its decision is the "clearly erroneous" rule. Thus, either petitioner was deprived of her right to have adequate findings of fact in the record prior to decision on the merits by the court of appeals or of her right to an independent review of the facts by that court.

The second error in the argument of respondent is the assumption that no question of Illinois law is involved.

2. See: *Woodruff* v. *Heiser*, 150 F. (2d) 873 (C. A. 10th, 1945); *Burman* v. *Lenkin Const. Co.*, 149 F. (2d) 827, 828 (C. A. D. C., 1945); *Herwitz* v. *Herwitz*, 136 F. (2d) 796, 799 (C. A. D. C., 1943); *Hazeltine Corporation* v. *General Motors Corporation*, 131 F. (2d) 34, 37 (C. A. 3rd, 1942); *Knapp* v. *Imperial Oil & Gas Products Co.*, 130 F. (2d) 1, 3 (C. A. 4th, 1942), and *Girard Trust Co.* v. *Amsterdam*, 128 F. (2d) 376, 377 (C. A. 5th, 1942).

ling itself limited by the clearly erroneous rule, the rt of appeals failed to take any cognizance of the trial rt's finding that this occurrence was an "accident" mpare Pet. 23-4 with the statement of the issues by court of appeals at Pet. 25).[3] Actually, under the ois authorities cited at page 15 of the Petition, such nding is inconsistent with a finding that the plaintiff contributorily negligent. Likewise, the Court of Ap- ls ignored the questions of law tendered to it with re- et to "forseeability," "negligence" and "contributory ligence" (Pet. 15-17). Its only announced basis for was the "clearly erroneous" rule; yet, in most cir- s, this rule does not prevent the review of findings of for errors of law (Pet. 13), and both negligence and tributory negligence are mixed questions of fact and *Matsumoto* v. *Chicago & N. W. Ry. Co.*, 168 F. (2d) 499 (C. A. 7th, 1948).

his error with respect to the scope of review under e 52(a) was the basis of petitioner's third "Reason Granting the Writ" (Pet. 13-17). Significantly, re- ndent completely ignores this reason, and attempts, out demonstration, to gloss over these issues of law by ing that, "this case does not involve any complex ques- s of Illinois law." Being without support in the Illi- authorities, this assertion of respondent can be ex- ned only in terms of practical necessity. To have d this issue squarely would have been to admit that

[3] Respondent's argument (R. Br. 7) that findings are suffi- if, when read in conjunction with the court's opinion, they the court of appeals a clear understanding of the basis of decision, is irrelevant. A comparison of the trial court's ion and the findings indicates that they are substantially tical (Pet. 21-23), and a comparison of both with the opinion w conclusively demonstrates that the court of appeals com- ly ignored the role of the findings concerning "accident" "forseeability", in the trial court's decision.

the court of appeals had misconceived the scope of review under Rule 52(a).

Respondent attempts to minimize the question of the sufficiency of the findings under Rule 52(a) as not being one of general importance in Federal practice (R. Br. 6). The very number of authorities cited by both the respondent and the petitioner indicates the frequency with which this question has arisen and the difficulties that it presents. Moreover, none of the cases which reached this court is a negligence case, and, as respondent states, the degree of exactness required depends upons the circumstances of the particular case.[4] The fact that in "the exceedingly simple factual background of the case" at bar, the trial court made findings which did not reach the real controversy between the parties as to the facts; and the court of appeals held that, "This court may not set aside findings of fact of a trial court unless such findings are clearly erroneous," and the petitioner in this court is confronted with the "harmless error" argument, demonstrates a need for a new examination of the requirements of Rule 52(a) as they apply to trial and appellate practice.

Respondent seeks to narrow the basis of petitioner's application for a writ of certiorari to the failure of the trial court to comply with Rule 52(a) in its findings of fact (R. Br. 5). In so doing, respondent ignores the second, third and fourth questions presented (Pet. 3, 4).

Petitioner urges that she was denied review of questions not subject to the clearly erroneous limitation. When the

4. There may be some who would state that the issues in every negligence case are the same. This is a fallacy because, while the ultimate or legal issues are the same, one negligence case differs from all others in the factual disputes that exist between the parties. From the need to pin-point the factual disputes between the parties has arisen the modern pretrial conference procedure. Because of these factual disputes, findings of fact in terms of the ultimate issues in a negligence case serve little purpose.

clearly erroneous doctrine, as a restriction on the court of review, is applied to all findings, without regard to whether they are specific findings of the factual controversy or legal conclusions from facts which are not found, then the requirements of Rule 52(a) become important, because findings which do not meet these requirements should be subject to unrestricted review in the court of appeals, *Galena Oaks Corporation* v. *Scofield,* 218 F. (2d) 217, 219 (C. A. 5th, 1954).

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